

E.D.N.Y.
03-cv-3742
Feuerstein, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 24th day of September, two thousand and four,

Present:

Hon. Dennis Jacobs,
Hon. Rosemary S. Pooler,
Hon. Sonia Sotomayor,
Circuit Judges.

Edith A. Culbertson,

Plaintiff-Appellant,

v.

04-2077-cv

Charosa Foundation Corporation, et al.,

Defendants-Appellees.

Appellee Charosa Foundation moves to dismiss Appellant's appeal as untimely and Appellant, *pro se*, moves for appointment of counsel. Upon due consideration, it is ORDERED that the motion to dismiss is denied because the notice of appeal was filed within 30 days of entry of the February 26, 2004 order. See Fed. R. App. P. 4(a)(4)(A); United States ex rel. McAllan v. City of New York, 248 F.3d 48, 52 (2d Cir. 2001)(*per curiam*). Furthermore, it is ORDERED that the judgment of the district court is VACATED and the case is REMANDED because the district court relied on summary judgment cases, rather than cases pursuant to Fed. R. Civ. P. 12, to dismiss the complaint, and, in any event, all the cases the district court relied upon pre-date the Supreme Court's opinion in Swierkiewicz v. Sorema, 534 U.S. 506, 511-514 (2002). The motion for appointment of counsel is denied as moot.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: _____
Richard Alcantara, Deputy Clerk